IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

FIREMAN'S FUND INSURANCE COMPANY, Plaintiff, v. UNITED STATES FIDELITY AND GUARANTY COMPANY; ST PAUL MARINE AND FIRE INSURANCE COMPANY; TRAVELERS CASUALTY AND SURETY COMPANY; and TRAVELERS PROPERTY CASUALTY INSURANCE COMPANY, Defendants.	)	No. CV-09-263-HU OPINION & ORDER

James M. Hillas
DUNN CARNEY ALLEN HIGGINS & TONGUE LLP
851 S.W. Sixth Avenue, Suite 1500
Portland, Oregon 97204

Christopher M. Caputo
BAKER, DONELSON, BEARMAN, CALDWELL & BERKOWITZ
First Tennessee Bank Building
165 Madison Avenue, Suite 2000
Memphis, Tennessee 38103

Attorneys for Plaintiff

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Nicholas L. Dazer
BULLIVANT HOUSER BAILEY PC
300 Pioneer Tower
888 S.W. Fifth Avenue
Portland, Oregon 97204-2089

Attorney for Defendants

HUBEL, Magistrate Judge:

Plaintiff Fireman's Fund Insurance Company brings this equitable indemnity, contribution, and subrogation action against defendants United States Fidelity & Guaranty Company, St. Paul Marine & Fire Insurance Company, Travelers Casualty & Surety Company, and Travelers Property Casualty Insurance Company (collectively "Travelers" or defendants). Defendants move for summary judgment on all claims. All parties have consented to entry of final judgment by a Magistrate Judge in accordance with Federal Rule of Civil Procedure 73 and 28 U.S.C. § 636(c). I grant the motion.

BACKGROUND

Plaintiff was the insurance company for the owner of an apartment project called "Stadium Station," located at 737 Southwest 17th Ave, in Portland (referred to as "the Project"), for the term beginning July 1, 2000. The owner of the Project was Grayco, LLC. Previously, Grayco had obtained property insurance coverage on the Project from defendants under the following three policies:

(1) Policy No. USF&G 1MP30138209200 (7/1/97 to 6/30/98);

(2) Policy No. USF&G 1MP30138209201 (7/1/98 to 6/30/99);

(3) Policy No. St Paul CK 08701606 (7/1/99 to 6/30/00).

The Project was completed in early 1998. Grayco observed water intrusion following completion of the Project and enlisted

the general contractor of the Project to correct the water intrusion problems. Grayco also hired a consultant to perform destructive testing on the Project building. In 2003, Grayco's consultant determined that water damage had been taking place "since construction." The consultant opined that the water intrusion "had deteriorated portions of the Project to the point of imminent collapse."

On November 24, 2003, Grayco reported the loss to both plaintiff and defendants. Exh. 5 to Dazer Declr. Defendants responded to the loss notice on December 3, 2003, and indicated they were starting an investigation of the claim. Exh. 6 to Dazer Declr. at pp. 1-2. Plaintiff responded to the loss notice on December 12, 2003, also indicating that it was starting an investigation of the claim. Id. at pp. 3-5.

Evidence in the record includes correspondence from defendants' accountant to a representative of Grayco's indicating that in a January 6, 2004 telephone conversation between the accountant and a representative of Grayco, the accountant understood that Grayco had instructed that any claim against USF&G was to be put on the "back burner." Exh. 10 to Dazer Declr. Later correspondence in January 2004 from defendants' Executive General Adjuster Charles Murray to Grayco's representatives acknowledged what Murray described as Grayco's wishes that USF&G and St. Paul "stand down" from investigating the cause and origin of the damages to the Project. Exh. 8 to Dazer Declr.

Grayco collected money from its general contractor and then joined its general contractor in an arbitration proceeding against others for damages arising out of construction defects and

resulting water intrusion. Exh. 13 to Dazer Declr. (copy of arbitration demand). A settlement conference was held in November 2004. Defendants declined Grayco's request that defendants attend.

In February 2005, plaintiff paid Grayco $589,000 to settle the claim. Exh. 15 to Dazer Declr. Plaintiff obtained an assignment of Grayco's rights against defendants as part of the settlement. Other relevant facts and policy provisions are discussed below.

STANDARDS

Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party bears the initial responsibility of informing the court of the basis of its motion, and identifying those portions of "'pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)).

"If the moving party meets its initial burden of showing 'the absence of a material and triable issue of fact,' 'the burden then moves to the opposing party, who must present significant probative evidence tending to support its claim or defense.'" Intel Corp. v. Hartford Accident & Indem. Co., 952 F.2d 1551, 1558 (9th Cir. 1991) (quoting Richards v. Neilsen Freight Lines, 810 F.2d 898, 902 (9th Cir. 1987)). The nonmoving party must go beyond the pleadings and designate facts showing an issue for trial. Celotex, 477 U.S. at 322-23.

The substantive law governing a claim determines whether a fact is material. T.W. Elec. Serv. v. Pacific Elec. Contractors

Ass'n, 809 F.2d 626, 630 (9th Cir. 1987). All reasonable doubts as to the existence of a genuine issue of fact must be resolved against the moving party. Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 587 (1986). The court should view inferences drawn from the facts in the light most favorable to the nonmoving party. T.W. Elec. Serv., 809 F.2d at 630-31.

If the factual context makes the nonmoving party's claim as to the existence of a material issue of fact implausible, that party must come forward with more persuasive evidence to support his claim than would otherwise be necessary. Id.; In re Agricultural Research and Tech. Group, 916 F.2d 528, 534 (9th Cir. 1990); California Architectural Bldg. Prod., Inc. v. Franciscan Ceramics, Inc., 818 F.2d 1466, 1468 (9th Cir. 1987).

DISCUSSION

As indicated above, plaintiff brings three claims: common law indemnity, equitable contribution, and equitable subrogation.

> In an action for common law indemnity, the claimant must allege and prove that (1) he or she has discharged a legal obligation owed to a third party; (2) the defendant was also liable to the third party; and (3) as between the claimant and the defendant, the obligation should be discharged by the latter.

Safeco Ins. Co. of Am. v. Russell, 170 Or. App. 636, 639, 13 P.3d 519, 520 (2000).

An "insurer's rights against its co-insurer for contribution arise[] out of the equitable doctrine which holds that one who pays money for the benefit of another is entitled to be reimburse[d.]" Carolina Cas. Ins. Co. v. Oregon Auto. Ins. Co, 242 Or. 407, 417, 408 P.2d 198, 203 (1965). "Such rights do not arise by way of subrogation." Id.; see also TIG Ins. Co. v. Travelers Ins. Co.,

No. CV-00-1780-ST, 2003 WL 24051560, at *4 (D. Or. Mar. 24, 2003) (Oregon law permits an insurer to seek contribution from another insurer for its respective share of a covered loss); Guild v. Baune, 200 Or. App. 397, 403, 115 P.3d 249, 253 (2005) (action for contribution is normally an equitable remedy used to prevent unjust enrichment; noting that contribution has been defined as "'the right of a person who has discharged a common liability or burden to recover of another, who is also liable, the portion he or she ought to bear.'") (quoting Contribution, 18 Am. Jur. 2d § 1 (2004)).

> Subrogation is an equitable doctrine that is based on a theory of restitution and unjust enrichment. . . . It enables a secondarily liable party who has been compelled to pay a debt to be made whole by collecting that debt from the primarily liable party who, in good conscience, should be required to pay. . . . In the insurance context, subrogation permits an insurer in certain instances to recover what it has paid to its insured by, in effect, standing in the shoes of the insured and pursuing a claim against the wrongdoer. . . .
>
> The subrogated party acquires precisely the same rights as the party for whom it substitutes, and no more than that. . . . Thus, in the insurance context, an insurer may pursue a subrogation claim only if its insured could have pursued the underlying claim, and the insurer's claim is subject to all of the defenses that could have been asserted if the insured had pursued the underlying claim.

Koch v. Spann, 193 Or. App. 608, 612, 92 P.3d 146, 148 (2004) (citations omitted).

In support of their motion, defendants make the following arguments: (1) plaintiff cannot establish that it discharged any obligation that was owing by defendants at the time plaintiff paid money to Grayco, because at that time (a) Grayco had abandoned its claim as to defendants; and (b) Grayco had failed to file suit

within the two-year contractual limitation period even if it had not abandoned its claim; and (2) plaintiff cannot demonstrate that Grayco sustained a loss that would have been covered by defendants' policies because there is no evidence of a covered cause of loss during defendants' policy periods, which is a predicate to plaintiff's claims for recovery.

The summary judgment record demonstrates that a genuine issue of fact exists on the question of whether Grayco abandoned its claim as to defendants. However, I agree with defendants that the two-year contractual limitation period prevents plaintiff from obtaining relief on any of its claims. Thus, I do not discuss the coverage argument. Additionally, I do not discuss defendants' objection to, and request to strike, the testimony of plaintiff's expert Clemens Rossell because none of his testimony is relevant to the abandonment or contractual limitation issues.

Both of the USF&G policies and the St. Paul policy contained contractual limitation of suit provisions. The first two policies provided as follows:

> **D. LEGAL ACTION AGAINST US**
>
> No one may bring a legal action against us under this Coverage part unless:
>
> **1.** There has been full compliance with all of the terms of this Coverage Part; and
>
> **2.** The action is brought within 2 years after the date on which the direct physical loss or damage occurred.

Exh. 2 to Dazer Declr. at p. 10. The third policy, issued by St. Paul, provided:

> **Lawsuits Against Us**
>
> No one can sue us to recover under this policy unless all of its terms have been lived up to.

> **If your policy includes property insurance.** Any lawsuit to recover on a property claim must begin within 2 years after the date on which the direct physical loss or damage occurred . . .

Exh. 4 to Dazer Declr. at p. 6.

Both of these provisions are consistent with Oregon Revised Statute § (O.R.S.) O.R.S. 742.240, which provides that

> [a] fire insurance policy shall contain a provision as follows:
>
> No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within 24 months next after inception of the loss.

O.R.S. 742.240. Oregon courts have applied this provision outside of the fire insurance context. See Herman v. Valley Ins. Co., 145 Or. App. 124, 126 n.1, 928 P.2d 985, 987 n.1 (1996) (in case involving a homeowner's insurance policy, court noted that "[b]y its terms, ORS 742.240 applies only to fire insurance policies. As construed, it applies to homeowner's insurance policies as well.") (citing Hatley v. Truck Ins. Exchange, 261 Or. 606, 494 P.2d 426, 495 P.2d 1196 (1972) (property insurance policy with vandalism endorsement required by O.R.S. 742.240 to contain suit limitation provision)). Additionally, the Oregon Supreme Court has held that the suit limitation provision in O.R.S. 742.240 is to be strictly interpreted and is not subject to a discovery rule. Moore v. Mutual of Enumclaw Ins. Co., 317 Or. 235, 244-50, 855 P.2d 626, 632-35 (1993).

According to the plain language of these provisions, any suit by Grayco under the policies and against defendants would have been commenced by July 2002. Grayco originally tendered its claim to defendants in November 2003, alleging damages arising out of water

intrusion beginning in early 1998. The November 2003 tender was more than three years after the most recent Travelers policy ended in June 2000, and more than one year after any suit by Grayco against Travelers was required to have commenced.

Defendants argue that as a matter of law, the Travelers policies that are the basis for plaintiff's claims are subject to the two-year contractual suit limitation provisions set forth in the policies pursuant to O.R.S. 742.240. At the time plaintiff made its settlement payment to Grayco, in February 2005, defendants contend that they had no legally enforceable obligation toward Grayco on which plaintiff could predicate any of its claims. Because Grayco would have had no claim against defendants when plaintiff settled Grayco's claim, there is no equitable, or other, basis under which plaintiff may claim any reimbursement from defendants. I agree with defendants.

Each of plaintiff's claims presumes an underlying obligation by defendants to Grayco. Most obvious is the subrogation claim in which the insurer (plaintiff) stands in the shoes of the insured (Grayco) to recover what the insurer paid the insured. The insurer obtains only the rights possessed by the insured. Here, at the time Grayco tendered its claim to defendants in November 2003, any suit Grayco could have brought under its policies with defendants was already untimely.

The indemnity and contribution claims suffer the same fate. In the contribution claim, plaintiff's payment must be found to have been for the benefit of defendants. But, if at the time plaintiff made that payment, defendants could not have been obligated to Grayco for any claim given the suit limitation

provision, as a matter of law plaintiff was not making a payment for defendants' benefit. The indemnity claim requires that plaintiff prove that it discharged a legal obligation owed to Grayco which was also owed by defendants. As explained, at the time plaintiff made the payment to Grayco, defendants had no legal obligation to Grayco.

Although not binding, the case cited by defendants is on point and offers a thorough explanation of why defendants prevail here. In Great American West, Inc. v. Safeco Insurance Company of America, 226 Cal App. 3d 1145, 277 Cal. Rptr. 349 (1991), plaintiff, a homeowners' insurance carrier, sought contribution and/or indemnity from defendant, the previous homeowners' carrier, after plaintiff paid a claim to the insureds for subsidence damage. The defendant was the insurer for a period of years before the plaintiff became the insurer. During the period when the defendant was the insurer, the insured noticed cracks in the driveway and an entry sidewalk to his home. Later, when the plaintiff was the insurer, the increased damage to the home's structure and foundation triggered a claim by the insured against the plaintiff. The plaintiff settled the claim with the insured and then brought the action against the defendant.

The trial court granted summary judgment to the defendant on the basis that the action was actually one for subrogation, despite the express claims for contribution and indemnity, and because the insured had failed to make a claim within one year of the damage as required by the defendant's policy. 226 Cal App. 3d at 1148, 277 Cal. Rptr. at 350-51. The appellate court concluded it need not resolve whether the nature of the claim was one of subrogation,

indemnity, or contribution because the policy's contractual limitation period rendered the plaintiff's claim untimely regardless of the theory of recovery. Id. at 1149, 277 Cal. Rptr. at 351.

The court first rejected the plaintiff's argument that plaintiff's only responsibility was to file suit within two years of paying the insured's claim. The court explained that this "argument improperly seeks to strip Great American's indemnity claim from the Safeco insurance policy on which it is based." Id. at 1150, 277 Cal Rptr. at 352. Noting the time limitation in the defendant's insurance policy, and further noting that the defendant's only responsibility to its insured is limited to the terms of the contractual insurance policy, the court explained that where an insurer like the plaintiff "seeks indemnity based on another party's (Safeco's) contractual responsibilities, provisions of the contract imposing time constraints - like any other provision of the contract - cannot be ignored. To do so would be to impose liability no longer based on the contract." Id,

The court then recognized, however, that while "contractual time limitations cannot be ignored by a party seeking indemnity," it was unclear how such limits related to an indemnity action brought by a third party insurer. Id. at 1151, 277 Cal. Rptr. at 352. The court noted that a simple rule would be to hold that any action relying on the insurance policy must be brought within the suit limitation period provided for in most policies. Id. at 1151, 277 Cal Rptr. at 353. But, the court further noted, such a rule "eliminates any distinction between the direct and indirect action." Id.

The court, citing to an insurance law treatise, suggested that while subrogation claims are controlled by the statute of limitations that would have been applicable had the insured brought suit in his or her own behalf, and are deemed to run starting from the date of the insured's loss, that is not the case with an indemnity claim which is an independent cause of action where the statute of limitations "'does not begin to run until the insurance company has provided policy benefits to the insured.'" Id. at 1152, 277 Cal. Rptr. at 353 (quoting Allan D. Windt, Insurance Claims and Disputes 554 (2d ed. 1988)).

Continuing to cite to Windt, the court noted that claims of contribution and indemnity do not accrue until the time of payment, and the statute of limitations does not begin to run until that time. Id. But, while generally an insurer is not barred from pursuing a contribution or indemnity reimbursement claim against another insurer "'on the grounds that the statute of limitations had run as to the insured's cause of action against such other insurers[,]'" the insurer seeking such reimbursement must still show that "'the insured had a viable cause of action against such insurers at the time the contribution or indemnity claim came into existence.'" Id. (quoting Windt at p. 562). Thus, the "critical question" is

> "not whether the limitations period had run prior to institution of the lawsuit, but whether it had run prior to payment of the insured's claim. If the limitations period had run by the time of the payment, the paying insurer would not have paid a debt that was concurrently owed by the other insurer. By virtue of the expiration of the limitations period, the other insurer's policy would no longer have provided any coverage. In that event, therefore, the paying insurer's contribution claim would never have come into existence."

Id. (quoting Windt at p. 563).

The court then explained that assuming the homeowner's loss was "first manifest" on the last day of the Safeco policy period in 1981, the plaintiff would possess an enforceable claim for contribution or indemnity under Windt's analysis only if, at the time it paid the claim, Safeco remained contractually liable to the insured homeowner. Id. at 1152-53, 277 Cal. Rptr. at 353. The facts, however, showed that the plaintiff had paid the claim in June 1986, almost four years after the one-year contractual limitations period on the defendant's obligations, expired. Id.

The court concluded by stating that it was

> unnecessary for us to decide whether an action for indemnity or contribution by a third party against an insurer must be filed within the one-year limitations period provided for in the contract, or whether it is sufficient if the one year had not yet expired at the time the third party made payment to the insured and the indemnity or contribution rights arose. Under either theory here, Great American's action against Safeco was too late.

Id. at 1153, 277 Cal. Rptr. at 353-54.

The same result occurs here. In the subrogation claim, plaintiff's claim is barred because, stepping into Grayco's shoes, suit was not filed on or before July 1, 2002, the end of the two-year contractual limitations period in the third policy. And, for the indemnity or contribution claims to be viable, defendants must have remained contractually liable to Grayco at the time plaintiff paid Grayco in February 2005. Because defendants no longer had any contractual liability to Grayco at that time, plaintiff's indemnity and contribution claims are untimely.

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CONCLUSION

Defendants' motion for summary judgment (#27) is granted.

IT IS SO ORDERED.

Dated this 17th day of May, 2010.

/s/ Dennis James Hubel
Dennis James Hubel
United States Magistrate Judge